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SUBJECT: OSCE LEGAL PERSONALITY, ROUND 5 - MOVEMENT FORWARD AS RUSSIA PLAYS NICE (FOR NOW)

REF: USOSCE 291 AND PREVIOUS

¶11. (SBU) Summary: At the July 5-6 round of negotiations on a Convention on Legal Personality, Legal Capacity and Privileges and Immunities for the OSCE (CLPPI), the absence of key players limited the WG's ability to deal with unresolved issues. There was extended discussion on a Belgian proposal that would exempt OSCE staff from paying national income tax provided an assessment was made that would go to the benefit of the organization itself despite concerns that such a decision would exceed the WG's mandate to deal with legal personality and privileges and immunities (P's and I's). Russia continued to insist that field operations are "temporary" and thus not fully part of the OSCE, but threw up fewer roadblocks to protecting field operations than in previous rounds. Significant progress was eventually made on the question of treatment of field operations staff both in substance (Russia has accepted identical P's and I's for both "members of the OSCE Secretariat and Institutions" and "members of field operations," with a more limited geographical scope for the latter) and terminology (field operations staff will not be contrasted with "OSCE officials," a Russian proposal roundly rejected by the WG). On entry into force (Article 18), there was a general feeling that something less than unanimous ratification by all 56 States should be required for the convention to take effect. The Russians appear to be taking a more conciliatory stance on convention negotiations with the goal of winning over more support for their charter draft. The next round is scheduled to take place September 13-14. End summary.

Articles 14 bis -- Members of Field Operations

¶12. (U) The fifth round of negotiations on the proposed CLPPI was again chaired by Dutch Ambassador Ida van Veldhuizen-Rothenbuecher, assisted by Austrian MFA Legal representative Helmut Tichy. The absence of the Russian MFA legal adviser and OSCE Parliamentary (PA) representative Nothelle limited discussion of certain important outstanding issues.

¶13. (U) Discussion of which P's and I's should be afforded field operations staff and other OSCE personnel was unexpectedly harmonious. The UK, backed by Canada, sought to eliminate one of the few remaining distinctions between the P's and I's to be given field operations staff and other OSCE personnel by proposing limiting P's and I's of all OSCE personnel (rather than only field operations staff) to the geographic areas where the officials are assigned. Russia, supported by the United States, disagreed, noting that such a clause would unnecessarily limit the geographic scope of the P's and I's for Secretariat staff, whose responsibilities, unlike those of field staff, extend throughout the entire OSCE region. After considerable discussion, Russia accepted identical P's and I's for all personnel, with a more limited geographical scope for field operation staff to country of assignment and when on

official travel, whereas staff of Secretariat and Institutions will have P's and I's throughout the OSCE region. It also made a key concession on terminology, in that field operations staff will not be contrasted with "OSCE officials," a proposal roundly rejected by other States. Instead, it has agreed to substitute a different term, such as "members of the OSCE Secretariat and Institutions," which does not imply that field operations staff are somehow not OSCE officials. The Chair told us later that Russia has also agreed to drop its insistence on distinguishing between "OSCE" and "Field Operations" in Articles 5-10 covering premises, assets, etc.

-- Sharp disagreement remains over whether to afford comprehensive immunity from personal arrest or detention to staff of the Secretariat and Institutions. Opponents noted that no such right is

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provided in the 1946 UN Convention, generally viewed as the model for P's and I's appropriate for IOs, while proponents argued that such immunity has been included in more recent conventions, such as those providing P's and I's for the ICC and ITLOS, and asserted that this more recent practice reflects the need to protect staff from political arrests.

-- On tax exemptions (14d), Belgium proposed conditioning tax exemptions for OSCE personnel on the existence of a "staff assessment" (in effect, an internal tax), citing the EU and the UN, where the incomes of respective personnel are exempt from paying an income tax but are instead subject to a staff assessment for the benefit of those organizations. Belgium proposed language for a similar system for the OSCE. The UK, Canada and Sweden supported but the Netherlands noted that such a proposal may be more difficult to sell in capitals. The Chair asked that this language be dropped; Belgium said this was not justified as no States had objected and only asked to consult with capitals. After considerable discussion, the Chair again stressed that the matter at hand was a convention to grant the OSCE legal personality; issues such as self-financing

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schemes for the organization could further complicate negotiations. The United States noted that there was no precedent for an international instrument's conditioning tax exemption on the existence of a staff assessment; all such schemes had been adopted internally, after and separately from establishment of the tax exemption principle. Tichy agreed, suggesting that the WG could consider such a proposal only if given a mandate following discussion in the Permanent Council. He instead tabled language in which individual parties could condition their grant of tax exemption to the existence of such a staff assessment.

Article 1 -- Definitions

14. (U) The Chair tried to reach consensus on 1(a), which defines the constituent elements of the OSCE (Russia since the beginning has objected to including "field operations"). The Chair recommended dropping "the Secretariat, Institutions [and Field Operations]" as the first two were never again mentioned in the convention and the last was dealt with separately in 14 bis. Supporting a Russian proposal, she then advocated adding language taken from the Rules of Procedure on executive structures. Russia again asserted that field operations were only "temporary" in nature and for that reason, its staff and P's and I's should be different from those of the Secretariat. Tichy said the crux of the issue rested on whether

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there would be a 14 bis on field operations. Russia then said that if there was agreement on the content and inclusion of 14 bis, language on 1(i) bis (defining members of field operations) could be kept. The provisionally agreed text follows standard practice by defining the "OSCE" simply as "the Organization for Security and Cooperation in Europe."

Article 18 (Entry into Force)

15. (U) There was considerable discussion over how many participating States must ratify the convention before it entered into force. The Chair noted that since the OSCE is a consensus-based organization, it should theoretically be all 56 States, but that would be difficult. Canada noted that if it were to be less than 56, there would be two legal regimes in effect, i.e., with the convention and without. However, since getting all 56 would take years, if it were even possible, Ottawa was prepared to support a ratification by 50 percent plus one, that is, the convention would go into effect after 29 States ratify. The UK agreed that less than 56 would be desirable and noted that those States that had not ratified could still enter into a bilateral relationship with the OSCE. Russia said it would prefer the "maximum" number, but could also compromise on something less, perhaps two-thirds. It also suggested that the ratifications of at least some, if not all, the 22 host countries (i.e., Austria (Secretariat), Denmark (OSCE PA), Poland (ODIHR), Czech Republic (Economic and Environmental Forum), as well as the 18 countries which currently host field operations) should be required as they were the States in which the CLPPI would have greatest impact. It noted that since only 34 participating States are not host countries, a two-thirds rule (39 ratifications) would mean that at least five host countries would be needed to ratify. The United States reserved its position. Tichy noted that once the convention enters into force, even if at a relatively low number, the OSCE's international legal personality would be established, and that it would be able to enter into contracts in those states which were party to the convention. It was agreed to bracket the numbers 29 and 39 into the text.

Comment

16. (SBU) The Russians seem to be playing nice so far, foregoing many (though not all) opportunities to poke sticks in the spokes and, in fact, were affirmatively cooperative on the issue of Field Operations. They may be seeking to cooperate on achieving an acceptable text before Madrid, then urge EU Members and others to pressure the United States to accept negotiations on a charter - ratification of which they have made a condition of approving a CLPPI. The Russian del again asserted to the U.S. representative on the margins of the talks that under Russian law, a convention granting legal personality and a legal instrument on structure (i.e., a charter) are necessary to provide P's and I's. Some States may find such an argument convincing. End comment.

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